UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TOMMY LEE HART, JR.,

Plaintiff,

v.

P.S. JORDAN, BADGE NO. 1596, S. MOORE, CHIEF OF POLICE RON PALMER, and THE CITY OF TULSA,

Defendants.

ENTERED ON DOCKET

DATE 11-30-98

97-CV-369-H(J)

FILED

NOV 25 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court on Defendants' Motion for Summary Judgment. The Court duly considered the issues and rendered a decision in accordance with the order filed on November 19, 1998.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendants and against Plaintiff.

IT IS SO ORDERED.

This 24TH day of November, 1998.

Sven Erik Holmes
United States District Judge

20

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOUGLAS RANDALL O'NEAL,)
)
Petitioner,)
)
vs.)
)
STEVE NOON KESTER, Chief)
Warden; and the ATTORNEY GENERAL)
OF THE STATE OF OKLAHOMA,)
)
Respondents.)

ENTERED ON DOCKET
DATE 11-30-98

Case No. 98-CV-428-H (E)

FILED
NOV 25 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Respondent's motion to dismiss petition for writ of habeas corpus as time barred. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondents and against Petitioner.

IT IS SO ORDERED.

This 24TH day of November, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOUGLAS RANDALL O'NEAL,	)	ENTERED ON DOCKET
	)	DATE 11-30-98
Petitioner,	)	
	)	
vs.	)	Case No. 98-CV-428-H (E) ✓
	)	
STEVE NOON KESTER, Chief Warden; and the ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,	)	FILED
	)	NOV 25 1998
Respondents.	)	Phil Lombardi, Clerk U.S. DISTRICT COURT

ORDER

Before the Court is Respondent's motion to dismiss petition for writ of habeas corpus (Docket #4). Petitioner, a state prisoner represented by an attorney in this action, has filed a response and supporting brief (#s 6 and 7). Respondent alleges the petition is time barred based on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition was not timely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

On December 2, 1993, Petitioner pleaded guilty in Delaware County District Court, Case No. CRF-92-176, to First Degree Murder and First Degree Burglary After Former Conviction of a Felony. He received sentences of life without parole on the murder conviction and ten (10) years imprisonment on the burglary conviction, to be served consecutively. He did not file a Motion to

9

Withdraw his guilty plea or otherwise perfect a direct appeal. On August 18, 1994, Petitioner filed an application for post-conviction relief in the state district court. (#5, Ex. A). That court denied the requested relief on January 22, 1997. (#5, Ex. B). Petitioner filed a petition in error in the Oklahoma Court of Criminal Appeals on February 20, 1997. (#5, Ex. C). The state appellate court affirmed the denial of post-conviction relief on April 11, 1997. (#5, Ex. D). Petitioner's petition for writ of habeas corpus, submitted by Petitioner's attorney, was file-stamped in this Court on June 18, 1998 (#1).

ANALYSIS

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, have been afforded a one-year grace period within which to file for federal habeas corpus relief.

The Tenth Circuit Court of Appeals has also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled during time spent pursuing properly filed state applications for post-conviction relief.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Because Petitioner failed to move to withdraw his guilty plea or to otherwise perfect a direct appeal following entry of the Judgment and Sentence on his guilty plea, his conviction became final ten (10) days later, on December 12, 1993. See Rule 4.2, *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw guilty plea within ten (10) days from the date of the pronouncement of the Judgement and Sentence in order to commence an appeal from any conviction of a plea of guilty). Therefore, Petitioner's conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner filed

his federal habeas corpus petition on June 18, 1998, or 786 days after April 24, 1996. However, Petitioner filed his application for post-conviction relief on August 18, 1994, and that action remained pending in the state district court when the AEDPA was enacted on April 24, 1996, also the day Petitioner's limitations clock began ticking. Pursuant to Hoggro, the time during the grace period when Petitioner had "a properly filed application for State post-conviction or other collateral review" pending should be subtracted from the 786 days. Thus, the 352 days from April 24, 1996 (when the grace period commenced with Petitioner's post-conviction application pending in Delaware County District Court) to April 11, 1997 (when the Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief) should not be counted. The resulting elapsed time on Petitioner's limitations period is 434 days, well beyond the one-year limit. Although Petitioner complains of the state district court's delay in ruling on his application for post-conviction relief, he offers no explanation for the more than 14-month delay between the denial of post-conviction relief by the Oklahoma Court of Criminal Appeals and the filing of the instant petition. Therefore, the Court concludes that the petition for writ of habeas corpus is untimely and Respondent's motion to dismiss this petition as time-barred should be granted.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period as defined in United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#4) is **granted**.

2. The petition for writ of habeas corpus is **dismissed with prejudice.**

IT IS SO ORDERED.

This 24TH day of NOVEMBER, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDDIE M. BEASLEY,

Defendant.

No. 82-CR-87-C
98CV813C

ORDER

Currently pending before the Court is the motion filed by defendant, Eddie Beasley, styled "Petition for Writ of Error Coram Nobis." However, since Beasley clearly requests that the Court vacate his conviction and sentence, his motion is properly construed as one brought pursuant to 28 U.S.C. § 2255.

In his present motion, Beasley seems to represent that the motion relates to two separate case numbers in which he was a defendant: 82-CR-87 and 96-CR-153. In his opening paragraph of the present motion, Beasley states that he was convicted in this Court on January 14, 1983, following a jury trial for certain controlled substance violations. He goes on to state that in July of 1996, he "was taken into custody, resulting in Case No. 96-CR-153-001-C, which is tied directly with Case No. 82-CR-87-02-C." The docket also reveals that Beasley was involved in a related case, 88-CR-74. However, throughout his present motion, he repeatedly cites to, and raises complaints concerning, case number 82-CR-87. For instance, Beasley makes the following assertions in his present motion: (1) the Court sentenced him to thirteen years imprisonment and imposed a $20,000 fine arising from the 1982 case, (2) although his sentence was reduced because of his military service in Vietnam, no

446/2

consideration was given for his service in Korea, (3) his trial attorney in the 1982 case was Richard Esper, and (4) his conviction and sentence were affirmed on appeal in 1984. Beasley proceeds to make repeated attacks on Esper's performance during his trial and subsequent appeal, alleging ineffective assistance. He alleges prosecutorial misconduct, and he argues that the Court imposed excessive bail. He additionally attacks his sentence of imprisonment, as well as the Court's imposition of the $20,000 fine. Beasley also claims that the Bureau of Prisons does not have the right to collect fines for the Court. In contrast, Beasley makes virtually no mention of his 1996 case or resulting conviction and sentence, and he does not appear to attack any aspect of the 1996 case. Because it is clear to the Court that the present motion only challenges Beasley's conviction and sentence resulting from case number 82-CR-87, the motion has been docketed accordingly.

Prior to addressing the merits of Beasley's motion, the Court notes that § 2255, as amended in April of 1996, provides for a one-year limitations period in which to file a § 2255 motion after the date on which the judgment of conviction becomes final. Following this amendment to § 2255, however, the Tenth Circuit mandated a one-year grace period in which to allow the filing of § 2255 motions, holding that "prisoners whose convictions became final on or before April 24, 1996 must file their § 2255 motions before April 24, 1997." United States v. Simmonds, 111 F.3d 737, 746 (10th Cir.1997). It is clear that Beasley's conviction became final prior to April 24, 1996, yet his present motion was not submitted until October 14, 1998. As such, his present motion is time-barred.

Further, even if the Court were to construe the present motion as one made under case number 96-CR-153, the Court would reach the same result. Beasley was sentenced on December 20, 1996, and judgment was entered on January 6, 1997. Beasley did not file a direct appeal. Hence, the judgment of conviction became final ten days after judgment was entered, at the time when

Beasley could no longer file a direct appeal. See Allen v. Hardy, 106 S.Ct. 2878 (1986) (judgment of conviction is final when the judgment of conviction is rendered and the availability of appeal exhausted). Thus, since judgment of conviction became final in January 1997, and because the present motion was not submitted until October 14, 1998, more than one year after the judgment became final, Beasley's motion is time-barred.

Accordingly, Beasley's motion pursuant to § 2255 is hereby DENIED.

IT IS SO ORDERED this 23rd day of November, 1998.

H. Dale Cook
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CURTIS WAYNE KENDRICKS, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 98-C-293-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 25 day of November, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

9

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRITTANY FREEMAN GRANT,

Plaintiffs,

vs.

LARRY GALBO,

Defendant.

No. 98-C-33-K

JUDGMENT

This action came on for jury trial, Honorable Terry C. Kern, Chief District Judge, presiding, and the issues having been duly heard and a verdict having been duly rendered,

IT IS THEREFORE ORDERED that Judgment be entered in favor of the defendant and against the plaintiff, and that plaintiff take nothing by way of this action.

ORDERED this 25 day of November, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

12

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

COMMUNICATION GRAPHICS, INC., an Oklahoma corporation, **Plaintiff,**	)	
vs.	)	**Case No. 98-CV-0226K (J)**
CON-WAY TRANSPORTATION SERVICES, INC., a Delaware corporation, d/b/a CONWAY SOUTHERN EXPRESS, **Defendant.**	)	**Tulsa County District Court Case No. CJ 98-0703**

ORDER OF DISMISSAL

On the Joint Stipulation of Dismissal of the parties herein, filed on the 20th day of November 1998,

IT IS NOW ORDERED THAT the above-entitled action be, and is, dismissed with prejudice to both parties.

Dated: November 25, 1998

JUDGE OF THE DISTRICT COURT

MICHAEL JAMES KING, OBA # 5036
M. JEAN HOLMES, OBA # 13507
WINTERS, KING & ASSOCIATES, INC.
2448 E 81st Street, Suite 5900
Tulsa, Ok 74137-4259
(918) 494-6868; fax 491-6297
ATTORNEYS FOR PLAINTIFF

David B. Schneider
LAW OFFICES OF DAVID B. SCHNEIDER, P.C.
210 Park Avenue, Suite 1120
Oklahoma City, Ok 73102
ATTORNEY FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 25 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MACK FREEMAN and DEANNA FREEMAN

Plaintiffs,

vs.

ALLSTATE INSURANCE COMPANY, the SHERIFF OF DELAWARE COUNTY, OKLAHOMA, the CITY OF GROVE, OKLAHOMA, the CITY OF COMMERCE, OKLAHOMA, and the OKLAHOMA HIGHWAY PATROL,

Defendants.

Case No. 97-CV-865-BU(J)

ENTERED ON DOCKET
DATE NOV 30 1998

STIPULATION OF DISMISSAL WITH PREJUDICE

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, Allstate Insurance Company, Sheriff of Delaware County, City of Grove and City of Commerce, are hereby dismissed with prejudice.

Mack Freeman
MACK FREEMAN, PLAINTIFF

Deanna Freeman
DEANNA FREEMAN, PLAINTIFF

FELDMAN, FRANDEN, WOODARD & FARRIS

By: _____
R. Jack Freeman, OBA #3128
1000 Park Centre
525 South Main
Tulsa, Oklahoma 74103

ATTORNEYS FOR PLAINTIFFS

69

23

ELLER AND DETRICH
A Professional Corporation

By: _____
JOHN H. LIEBER, OBA #5421
2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114
(918) 747-8900

ATTORNEY FOR DEFENDANT,
CITY OF COMMERCE

SECREST, HILL & FULLUO

By: _____
James K. Secrest, II, Esq.
Edward J. Main, Esq.
7134 South Yale
Suite 900
Tulsa, Oklahoma 74136

ATTORNEY FOR DEFENDANT,
ALLSTATE INSURANCE COMPANY

COLLINS, ZORN, JONES & WAGNER

By: _____
Jason C. Wagner, Esq.
Chris Collins, Esq.
429 NE 50th Street, 2nd Floor
Oklahoma City, OK 73105-1815

ATTORNEY FOR DEFENDANT,
SHERIFF OF DELAWARE COUNTY

ROSENSTEIN, FIST & RINGOLD

By: _____
J. Douglas Mann, Esq.
525 S. Main, Suite 700
Tulsa, Oklahoma 74103-4508

ATTORNEY FOR DEFENDANT,
CITY OF GROVE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BARRETT C. DAILEY,	)	
	)	
Plaintiff,	)	
vs.	)	**CASE NO: 97-CV-868-B (W)**
	)	
THE BISON GROUP, INC.,	)	**ATTORNEY LIEN CLAIMED**
	)	
Defendant.	)	

DEFAULT JUDGMENT

ON THIS 18TH DAY OF NOVEMBER, 1998, this Court considered Plaintiff, Barrett C. Dailey's Motion for Default Judgment. The Clerk of Court entered Default on April 23, 1998. After considering the Court's file and the evidence induced at the hearing, this Court grants the Motion for Default Judgment and renders judgment as follows:

1. This Court orders that Plaintiff, Barrett C. Dailey, recover from Defendant, The Bison Group, Inc., the sum of $33,000.00 for back wages.

2. This Court orders that Plaintiff, Barrett C. Dailey, recover from Defendant, The Bison Group, Inc., the sum of $944.00, this sum representing the balance of an apartment lease owed by Mr. Dailey.

3. Plaintiff, Barrett C. Dailey requested reasonable attorney's fees and filed an Affidavit proving attorney fees in the amount of $1,484.72. This Court orders the Defendant, The Bison Group, Inc., to pay Plaintiff the sum of $1,484.72 for attorney's fees.

4. This Court specifically declines to order Defendant, The Bison Group, Inc., to pay liquidated damages as requested by Plaintiff, B.C. Dailey, in the sum of $66,000.00, as requested

by Plaintiff, due to the fact that liquidated damages were not sought in the Petition filed.

5. The Court orders execution issued for this Judgment.

6. The Court denies all relief not granted in this Judgment.

THIS IS A FINAL JUDGMENT.

DATED THIS 20TH DAY OF NOVEMBER, 1998.

Judge of the U.S. District Court

APPROVED AND ENTRY REQUESTED:

Charles E. Jarvi, OBA #17651
John M. Butler, OBA #1377
Butler, Johnson & Associates
6846 South Canton, Suite 150
Tulsa, Oklahoma 74136
(918) 494-9595
(918) 494-5046 Facsimile

Counsel for Plaintiff, Barrett C. Dailey

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE EXCHANGE BANK,

Plaintiff,

vs.

THE DIRECTOR OF THE OFFICE OF THRIFT SUPERVISION,

Defendant,

AMERICAN BANK OF OKLAHOMA, COLLINSVILLE, OKLAHOMA, a federally chartered stock saving bank,

Intervenor/Defendant.

No.98-CV-241-C (J)

JUDGMENT

This matter came before the Court for consideration of the motions for summary judgment filed by defendant, the OTS, and intervenor/defendant, American Bank of Oklahoma, on plaintiff, Exchange Bank's, cause of action challenging an order of the OTS, pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* The issues having been duly considered by the Court, and a decision having been rendered in favor of defendant and intervenor/defendant,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered for defendant, the OTS, and intervenor/defendant, American Bank, and against plaintiff, Exchange Bank.

IT IS SO ORDERED this 23rd day of November, 1998.

H. DALE COOK
Senior United States District Judge

26

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THE EXCHANGE BANK,

Plaintiff,

vs.

THE DIRECTOR OF THE OFFICE OF THRIFT SUPERVISION,

Defendant,

AMERICAN BANK OF OKLAHOMA, COLLINSVILLE, OKLAHOMA, a federally chartered stock saving bank,

Intervenor/Defendant.

No.98-CV-241-C (J)

ORDER

Pending before the Court are the motions for summary judgment filed by plaintiff, Exchange Bank ("Exchange"), defendant, Office of Thrift Supervision ("OTS"), and intervenor/defendant, American Bank of Oklahoma.

The material facts in this case are not disputed. In June 1997, a group of individuals ("organizers") applied to the OTS for permission to organize a federal savings association under the name of American Bank of Oklahoma ("American"). The organizers sought to establish American's home office in Collinsville, Oklahoma, with a branch office in Skiatook, Oklahoma. Exchange and Bank of the Lakes of Collinsville filed a protest against the application and requested a hearing. Specifically, Exchange opposed the organizers' request to open a branch office in Skiatook.[1] Exchange's principal argument before the OTS was that the Community Reinvestment Act ("CRA"),

[1] The substance of Exchange's protest is that it will suffer injury from being forced to compete with American in Skiatook.

25

12 U.S.C. § 2901 *et seq.*, and the OTS's regulations implementing that Act prohibit the approval of a branch application prior to the applicant establishing a record of helping to meet the credit needs of the community. Thus, since American had never conducted business and, therefore, had no record of community reinvestment, Exchange maintained that the OTS could not approve the organizers' application to establish the Skiatook branch office. Exchange essentially argued for a per se rule prohibiting the contemporaneous establishment of a savings association and a branch office.

The OTS held a hearing in October 1997, in Dallas, Texas, at which Exchange was permitted to present its argument against the application. In February 1998, the OTS issued an order approving the organizers' application and granting a charter to American. The order also authorized American to open a branch office in Skiatook. In March 1998, Exchange requested the OTS to stay the portion of its order permitting American to establish the Skiatook branch office. Exchange's request was denied, and this action followed.

On March 27, 1998, Exchange filed the present action challenging the OTS's order authorizing American to open its Skiatook branch office. Along with its complaint, Exchange filed a motion to stay the OTS's order pending judicial review of the agency action. This Court denied Exchange's motion for stay on May 19, 1998.

Standard of Review

In considering a motion for summary judgment, the Court "has no real discretion in determining whether to grant summary judgment." U.S. v. Gammache, 713 F.2d 588, 594 (10th Cir.1983). The Court must view the pleadings and documentary evidence in the light most favorable to the nonmovant, Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 527-28 (10th Cir.1994), and summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Akin v. Ashland Chemical Co., 156 F.3d 1030, 1034 (10th Cir. 1998). Further, "'the moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment.'" Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991) (quoting Ewing v. Amoco Oil Co., 823 F.2d 1432, 1437 (10th Cir.1987)). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter. Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir.1991). The "party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (citations omitted).

Discussion

Prior to addressing the merits of this action, the Court must determine whether Exchange has standing to challenge the OTS's order in this Court.[2] The OTS argues that Exchange lacks Article III standing as well as prudential standing. Conversely, Exchange contends that it does have standing to contest the OTS's order due to the injury it will suffer if American is permitted to compete with Exchange in Skiatook. Exchange further submits that it "has an interest in assuring that competitor institutions are not allowed to avoid their CRA requirements."

It is well-settled that the party seeking to invoke the authority of the Court bears the burden of establishing standing. See Loving v. Boren, 133 F.3d 771, 772 (10th Cir. 1998) (the elements of

[2] The OTS raises the issue of standing in its motion for summary judgment.

standing are an indispensable part of plaintiff's case, upon which he bears burden of proof). In its response to the OTS's argument that it lacks standing to challenge the order at issue, Exchange contends that this argument "is contrary to the OTS's earlier position with respect to Exchange Bank's protest. The OTS in examining Exchange Bank's protest determined that Exchange Bank's protests met the regulatory criteria to be deemed 'substantial' and accordingly allowed oral argument." Thus, Exchange appears to argue that since the OTS permitted it to protest the application before the agency, Exchange necessarily has standing to contest the OTS's order here. Mere participation in the administrative process, however, does not confer standing to bring an action in federal court. City of Orrville, Ohio v. Federal Energy Regulatory Comm., 147 F.3d 979, 985 (D.C. Cir. 1998). See also Inner City Press v. Board of Governors of the Fed. Reserve, 130 F.3d 1088, 1089 (D.C. Cir. 1997) (participation in administrative proceedings does not, without more, satisfy a petitioner's Article III injury-in-fact requirement); Lee v. Board of Governors of the Fed. Reserve, 118 F.3d 905, 911(2d Cir. 1997) (same).

Hence, Exchange is required, under Article III of the Constitution, to demonstrate injury resulting from the OTS order at issue. The Supreme Court has recently reiterated the "irreducible constitutional minimum" of standing, which requires Exchange to show:

> (1) that [it has] suffered an 'injury in fact' – an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 117 S.Ct 1154, 1163 (1997).

It appears that Exchange has satisfied the first and second elements of standing. The fact that

Exchange will face certain competition from American's branch office, and that this will result in decreased deposits and profits to Exchange, may be properly characterized as an injury-in-fact. And, this injury was caused by the OTS's order approving American's application to open the Skiatook branch office. However, the third element of standing is more problematic since the Court has determined, for the reasons below, that summary judgment should be entered in favor of defendants. Nevertheless, it appears that Exchange's action, at the time it was filed, raised a genuine, debatable legal dispute and that redressibility by a favorable decision was not so remote or speculative as to deprive Exchange of Article III standing. Accordingly, the Court concludes that Exchange has met its burden of establishing standing under Article III of the Constitution.

The Court's inquiry into standing, however, does not end with a determination under Article III. In its complaint, Exchange states that "This Court has jurisdiction of this action under 28 U.S.C. § 1331 to review a final agency action of the OTS in accordance with the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*" Section 702 of the APA provides that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . ., is entitled to judicial review thereof." In interpreting § 702, the Supreme Court has consistently imposed a prudential standing requirement in addition to the constitutional injury-in-fact requirement. NCUA v. First Nat'l Bank & Trust Co., 118 S.Ct 927, 933 (1998). "For a plaintiff to have prudential standing under the APA, 'the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute . . . in question.'" Id. (quoting Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970)). Citing NCUA, Exchange argues that its present complaint is within the zone of interest to be protected by the CRA and its regulations since it "has an interest in assuring that OTS does not improperly relieve a competitor

savings association of it obligations under the CRA." The Court does not agree.

In determining whether a particular plaintiff's interest is arguably within the zone of interests to be protected by a statute, it is true that the Court should not inquire into whether there has been a congressional intent to benefit the plaintiff. Id. at 933. Rather, even if a particular plaintiff is, in essence, an unintended beneficiary of a statute, he nevertheless has prudential standing if he can meet the zone of interests test. However, the test denies a right of review if the plaintiff's interests are only marginally related to or inconsistent with the purposes of the relevant statute. Id. at 934. Accordingly, the Court is to "first discern the interests 'arguably . . . to be protected' by the statutory provision at issue; [the Court must] then inquire whether the plaintiff's interests affected by the agency action in question are among them." Id. at 935.

The purpose of the CRA is clear. The statute provides that:

> (a) The Congress finds that--
> (1) regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business;
> (2) the convenience and needs of communities include the need for credit services as well as deposit services; and
> (3) regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.
> (b) It is the purpose of this chapter to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.

12 U.S.C. § 2901. The Court thus agrees with the OTS that the CRA was clearly intended to encourage federally regulated financial institutions to "help meet the credit needs of the local communities in which they are chartered."

It has also been noted that the "CRA is an amorphous statute. . . . Its pronouncement . . . is not

a directive to undertake any particular program or to provide credit to any particular individual. The statute, rather, is precatory." Lee, 118 F.3d at 913. Further, the CRA does not create a private right of action to enforce its terms, and it "sets no standards for the evaluation of a bank's contribution to the needs of the community." Id. Rather, the purpose of the CRA is simply "to encourage more coordinated efforts between private investment and federal grants and insurance in order to increase the viability of our urban communities." Id. (quoting H.R. Conf. Rep. No. 95-634, at 76). It is therefore clear that Congress, in enacting the CRA, intended for the statute to benefit the citizens of urban areas, typically the inner cities, which have historically suffered from a lack of community reinvestment by local financial institutions. The Court further agrees with the OTS that the CRA was designed to increase, not thwart, competition for previously underserved customers, and provide them with more, not less, access to credit. Accordingly, the interests arguably to be protected by the CRA are the interests of increasing access to credit by persons within urban areas, for the purpose of revitalizing such areas.

In contrast to the stated intentions of the CRA, Exchange's interest in bringing this lawsuit is to limit banking competition within the Skiatook community. The Court finds that this interest is inconsistent with the purposes of the CRA, as outlined above. Hence, it appears that Exchange cannot meet the zone of interests test since that test denies a right of review where a plaintiff's interests are inconsistent with the purposes of the statute in question. NCUA, 118 S.Ct. at 934. Of course, Exchange does not claim such a limited interest in bringing this action; rather, Exchange argues that since it must comply with the CRA requirements, it has an interest in assuring that the OTS does not improperly relieve a competitor of its CRA obligations. Relying on NCUA, Exchange maintains that the cases support its position that competitor banks have an interest in challenging agency action

which relaxes statutory restrictions on other competitors. The Court finds this reading of the cited cases too broad.

In NCUA and the cases cited therein, the relevant statutes served to limit the markets that certain financial institutions could serve. For example, in NCUA, the Supreme Court noted that the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1759, provides that "federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." The Supreme Court found that one of the interests arguably to be protected by the FCUA is an interest in limiting the markets that credit unions can serve. NCUA, 118 S.Ct. at 935. The Supreme Court, in concluding that the plaintiff banks had prudential standing to bring an action against the National Credit Union Administration, held that, regardless of any intention of Congress to benefit banks, the banks' interest in limiting the markets that credit unions can serve is arguably within the zone of interests to be protected by the statute. Id. at 938. Since the interest of the banks in limiting competition in its markets comported with the interest of the FCUA in limiting the markets credit unions can serve, the banks satisfied the zone of interests test. Similarly, in cases cited in NCUA, the Supreme Court held that, although Congress did not specifically intend to benefit travel agents and data processors by enacting the National Bank Act and the Bank Service Corporation Act, one of the interests arguably to be protected by these statutes "was an interest in preventing national banks from entering other businesses' product markets. As competitors of national banks, travel agents and data processors had that interest, and that interest had been affected by the [agency's] interpretations opening their markets to national banks." NCUA, 118 S.Ct. at 936 (citing Data Processing, supra; Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970)).

Hence, in all of these cases, there is one common theme – the statute at issue served to limit or restrict the market which the competitor-defendants could serve. As such, the competitor-plaintiffs in markets affected by the agency's action had prudential standing, based on their like interest of limiting competition in their particular market, to challenge the agency decision permitting the competitor-defendants to enter their markets. Here, however, the CRA expresses no interest in limiting competition in any market, and this, in fact, is contrary to the very purpose of the Act. Thus, Exchange's interest in limiting competition in its Skiatook market is not within the CRA's zone of interests. Further, the CRA expresses no interest in permitting one financial institution to bring an action to enforce the CRA's regulations for the purpose of limiting or excluding competition. Accordingly, the Court concludes that Exchange lacks prudential standing. However, even assuming that Exchange has standing to challenge the OTS's order, its claims are meritless.

"Where an agency purports to act pursuant to an interpretation of its own regulations, the court should generally undertake a two-step review of the government's action to determine whether it was statutorily authorized." Mission Group Kansas, Inc. v. Riley, 146 F.3d 775, 780 (10th Cir. 1998). Provided the "agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Id. (quoting Stinson v. United States, 508 U.S. 36, 45 (1993)). An agency's interpretation of its own regulations is subject to challenge for being arbitrary, capricious, or an abuse of discretion. Id. at n.3. If the agency's interpretation of its regulations survives this review, the Court then analyzes the regulations as interpreted under the familiar framework established by Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Id. at 780-81. "The standard of review is the same whether the agency interpretation is performed through rulemaking or,

as here, informal adjudication." Arco Oil and Gas Co. v. EPA, 14 F.3d 1431, 1433 (10th Cir. 1993). And, the Court agrees with Exchange that "an agency's failure to follow its own regulations is challengeable under the APA." McAlpine v. United States, 112 F.3d 1429, 1434 (10th Cir. 1997).

Here, the OTS concluded that its regulations do not require that a savings association actually have a history of operations before opening a branch. Rather, the OTS concluded that the regulatory criteria can be satisfied based on the policies set forth in American's business plan. That is, the OTS concluded that its regulations do not prohibit the opening of a branch office contemporaneously with organizing a savings association. The OTS contends that the regulations only require that the OTS consider an institution's efforts to comply with the CRA's stated goals when considering a branch office application. Further, the OTS argues that even if it finds that an institution's record of meeting the credit needs of the community is deficient, it is not thereby required to deny an application to open a branch office. Instead, this is simply a factor to be taken into consideration when analyzing a branch office application. In the present case, the OTS maintains that it did consider American's CRA record, which demonstrated that American had not made any loans. Therefore, the OTS found that American could not demonstrate that it had met the credit needs of the community. However, the OTS concluded that where an institution could not have previously complied with the goals of the CRA because the institution did not exist, it is sufficient under the regulation to look to its plan for future compliance. Conversely, Exchange argues that the regulations make clear that the OTS cannot approve a branch application at the same time it approves the organization of a savings association since the institution cannot demonstrate that it has met the credit needs of the community.

The Court agrees with the interpretation articulated by the OTS. Pursuant to its regulations, in considering whether to approve a branch application, "the OTS will assess and take into account

an association's record of helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods, pursuant to part 563e of this chapter." 12 C.F.R. § 545.92(e)(1). The regulation goes on to provide that "assessment of an association's record of performance **may** be the basis for denying an application." Id. (emphasis added). Thus, while the regulation, at first blush, appears to require an institution to produce a record of community assistance when submitting a branch application, the Court agrees with the OTS that this is not, in fact, required. Rather, the regulation simply mandates that the OTS take into account an association's CRA record when considering a branch application; it does not foreclose consideration of the application if no record exists. Similarly, 12 C.F.R. § 563e.29(a) provides that, "Among other factors, the OTS takes into account the record of performance under the CRA of each applicant savings association . . . in considering an application for: (1) The establishment of a domestic branch or other facility that would be authorized to take deposits." The regulation goes on to provide that "A savings association's record of performance may be the basis for denying or conditioning approval of an application listed in paragraph (a) of this section." 12 C.F.R. § 563e.29(d). Again, the regulation requires that the OTS consider an institution's CRA record, if one exists, when considering a branch application, but it does not, by its terms, prohibit the granting of a branch application if no CRA record exists. The provisions contained in 12 C.F.R. § 556.5(c)(1) and (3) result in the same conclusion.

Hence, the Court finds that the OTS's interpretation of its own regulations is not plainly erroneous or inconsistent with those regulations, and its interpretation is not arbitrary, capricious, or an abuse of discretion. The Court therefore adopts the OTS's interpretation. The Court also finds and concludes that the OTS's interpretation of its regulations does not violate Chevron, supra. First, Congress has not directly spoken to the precise issue in the CRA. There is no indication in the CRA

that an institution must produce a record of community reinvestment prior to being permitted to open a branch office. Second, the Court finds that the OTS's interpretation of the CRA is reasonable.

Accordingly, Exchange's motion for summary judgment is hereby DENIED. The OTS's and American's motions for summary judgment are hereby GRANTED.

IT IS SO ORDERED this 23rd day of November, 1998.

H. DALE COOK
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD W. TITTERUD, *et al.*)
)
Plaintiffs,)
)
vs.) No. 97-CV-518-B (M)
)
SNAPPY CAR RENTAL, INC., *et al.*)
)
Defendants.)

ORDER FOR DISMISSAL WITH PREJUDICE

THIS MATTER comes on before the Court upon the Stipulation of Dismissal with Prejudice signed by the attorneys for Plaintiffs and Defendants, and the Court being fully advised in the premises,

HEREBY ORDERS:

This civil action and all claims and counter-claims contained therein are dismissed with prejudice, each party to pay his or its own costs, expenses, and attorneys fees.

DATED this 20 day of Nov, 1998.

THOMAS R. BRETT, JUDGE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TUAN ANH NGUYEN,

Petitioner,

v.

GARY GIBSON, Warden of the Oklahoma State Penitentiary,

Respondent.

Case No. 98-CV-877-K

ORDER TRANSFERRING PETITION FOR WRIT OF HABEAS CORPUS AND EMERGENCY APPLICATION FOR STAY OF EXECUTION TO THE TENTH CIRCUIT COURT OF APPEALS

On November 18, 1998, Petitioner filed a petition for writ of habeas corpus and an emergency application for stay of execution in this Court. Respondents filed a motion to dismiss the petition for writ of habeas corpus and objected to the emergency application for stay of execution on November 24, 1998.

A review of Petitioner's previous case filing reveals that he has in the past filed one (1) other habeas corpus action in this Court. His first habeas case, 94-CV-688, was denied on October 21, 1996, a decision affirmed by the Tenth Circuit Court of Appeals on November 7, 1997. Nguyen v. Reynolds, 131 F.3d 1340 (10th Cir. 1997), *cert. denied*, 119 S.Ct. 128 (1998). In the current action, Petitioner claims he is insane under Oklahoma law and not eligible for execution under the Fourteenth Amendment. Since this claim was not raised in Petitioner's first habeas petition, the current habeas action constitutes a second or successive petition.

5

Pursuant to 28 U.S.C. § 2244, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996), a petitioner must first seek authorization from the court of appeals before filing a second or successive habeas petition in the district court. See Lopez v. Douglas, 141 F.3d 974 (10th Cir. 1998) (holding the district court lacks jurisdiction to decide an unauthorized second petition). When a petitioner fails to comply with this requirement, the District court should transfer the habeas petition to the Court of Appeals in the interest of justice pursuant to 28 U.S.C. § 1631. Coleman v. United States, 106 F.3d 339 (10th cir. 1997).

Petitioner claims this action is not a second petition and therefore not subject to the "gate keeping" provisions found in title 28 U.S.C. §2244. Petitioner cites Stewart v. Martinez-Villareal, ____ U.S. ____, 118 S.Ct. 1618 (1998), in support of his contention. However, a review of Martinez-Villareal, and its decision below, Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997), refutes Petitioner's assertion because the circumstances presented in Martinez-Villareal are easily distinguished from those in the case at bar.

In Martinez-Villareal, the petitioner raised the claim that he was not competent to be executed, along with his other claims for habeas relief, in his original petition, filed in 1993. 118 F.3d at 629. The district court denied the competency claim without prejudice as premature, but granted the writ on other grounds. Id. On appeal, the Ninth Circuit reversed but explained that the judgment for the respondent was "not intended to affect any later litigation of the [competency to be executed] question." Id. at 630 (quoting Martinez-Villareal v. Lewis, 80 F.3d 1301, 1309 n. 1 (9th Cir. 1996). On remand, the petitioner moved to reopen his earlier petition to avoid foreclosure of his competency claim in a second petition under § 2244. Id. Despite the

district court's assurances that the issue would not be foreclosed, when the petitioner raised the competency issue after it became ripe, the district court found it was a "second" petition, thereby leaving the court without jurisdiction to consider the claim under § 2244. Id.

The Ninth Circuit found the "gate-keeping" provisions of § 2244 did not apply to the petitioner because the claim had been timely raised in the first petition. Analogizing the situation to petitions that are dismissed for failure to exhaust, the Ninth Circuit found that because a competency to be executed claim is not ripe at the time the other habeas claims in the petition are ruled on,[1] the issue may be raised in a second petition just as if it had been raised in a first habeas petition even though not ripe. Id. at 634. Under the Ninth Circuit's "narrow" holding,

> a competency claim **must** be raised in a first habeas petition, whereupon it also must be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state court considers the now-ripe competency claim, a federal court may hear that claim-and only that claim- because it was originally dismissed as premature and therefore falls outside of the rubric of "second or successive" petitions.

Id. (emphasis added).

On appeal, the United States Supreme Court affirmed the Ninth Circuit's ruling that a claim of incompetency to be executed, which is raised a second time after the first claim was dismissed by the district court as premature, was not a second or successive petition for purposes of § 2244. 118 S.Ct. 1618. The finding that § 2244 did not apply was grounded in the fact that the petitioner had previously raised the competency claim in his first petition. Id. The Supreme Court stated that, "[t]his may have been the second time that respondent had asked the federal

---

[1] See Herrera v. Collins, 506 U.S. 390, 406 (1993) ("[T]he issue of sanity is properly considered in proximity to the execution").

courts to provide relief on his Ford [v. Wainwright, 477 U.S. 399 (1986)] claim, but that does not mean that there were two separate applications." 118 S.Ct. at 1621. "There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe." Id. Since the District Court considered the claim when it became ripe, petitioner Martinez-Villareal's Ford claim was not a "second or successive" petition under § 2244(b).

In contrast to Martinez-Villareal, in the instant case, Petitioner did not bring a claim of incompetency to be executed in his first habeas petition.[2] The current petition is the first time Petitioner has raised a Ford claim and it comes two years after the Court denied Petitioner's original habeas action. In Martinez-Villareal, the Supreme Court noted:

> [Martinez-Villlareal] does not present the situation where a prisoner raises a Ford claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application. Therefore, we have no occasion to decide whether such a filing would be a "second or successive habeas corpus application" within the meaning of [the] AEDPA.

118 S.Ct. at 1622 n. Thus, Petitioner's situation is not controlled by the narrow holding in Martinez v. Villareal, and the Court considers the current action a "second" petition as discussed in § 2244. See also In re Davis, 121 F.3d 952 (5th Cir. 1997) (distinguishing Martinez-Villareal where petitioner did not raise Ford claim in original habeas application and considering the newly raised Ford claim a "second" petition under § 2244).

Accordingly, Petitioner is required to seek authorization from the Tenth Circuit court of appeals before filing his second petition for writ of habeas corpus. Since Petitioner has not

---

[2] A review of Petitioner's first habeas petition shows a claim of incompetency at trial, but nowhere within that petition does he raise a claim of incompetency to be executed.

sought the required authorization, the Court, in the interest of justice and pursuant to §§ 1631 and 2244(b)(3)(A), finds that Petitioner's application for writ of habeas corpus should be transferred to the Tenth circuit court of appeals for authorization.

IT IS HEREBY ORDERED that Petitioner's emergency application for stay of execution and petition for writ of habeas corpus are **TRANSFERRED** to the Tenth circuit court of appeals for authorization.

IT IS SO ORDERED

This 25 day of November, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SHAN R. CHILDRESS, **SSN: 447-64-2448,**	)	
Plaintiff,	)	
v.	)	**Case No. 97-CV-270-EA**
KENNETH S. APFEL, **Commissioner of Social Security,**[1]	)	
Defendant.	)	

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 23rd day of November 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

---

[1] Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

NOV 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHAN R. CHILDRESS,
SSN: 447-64-2448,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,[1]

Defendant.

Case No. 97-CV-270-EA

ENTERED ON DOCKET
DATE NOV 24 1998

ORDER

Claimant, Shan R. Childress, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.[2] In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals.

Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

---

1 Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

2 On August 31, 1994, claimant protectively filed for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially (November 23, 1994), and on reconsideration (January 27, 1995). A hearing before Administrative Law Judge Leslie S. Hauger, Jr. (ALJ) was held November 28, 1995, in Tulsa, Oklahoma. By decision dated January 2, 1996, the ALJ found that claimant was not disabled. On January 23, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

I. CLAIMANT'S BACKGROUND

Claimant was born on September 9, 1965, and was 30 years old at the time of the hearing. Claimant has a ninth grade (special) education. He also completed some vocational training for automotive work, but the only work claimant has ever performed for any significant period was as a dishwasher for a 6-month period in 1985. Claimant alleges an inability to work beginning January 1, 1991, due to a variety of problems, initially characterized as pain in his arm and leg, back pain, and depression. (R. 15, 63, 68, 104.)

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the "...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment...." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy...." Id., § 423(d)(2)(A). Social

Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.[3]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991). One of the issues now before the Court is whether there is substantial evidence in the record to support the final decision of the Commissioner that claimant was not disabled within the meaning of the Social Security Act. The term substantial evidence has been interpreted by the U.S. Supreme Court to require "...more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence

---

[3] Step One requires the claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with certain impairments listed in Appendix 1 of Subpart P, Part 404, 20 C.F.R. Claimants suffering from a listed impairment or impairments "medically equivalent" to a listed impairment are determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If the claimant's Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant--taking into account his age, education, work experience, and RFC--can perform. See Diaz v. Secretary of Health & Human Servs., 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform light work subject to only simple repetitive work because of borderline IQ. (R. 17-18.) The ALJ concluded that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. Having concluded that there were a significant number of jobs which claimant could perform, the ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision.

IV. REVIEW

Claimant asserts as error that the ALJ:

A. failed to properly consider the claimant's severe mental impairments;

B. failed to properly consider the claimant's complaints of pain and limited mobility;

C. failed to link claimant's credibility with specific medical evidence;

D. failed to perform a proper RFC assessment; and

E. failed to include the Plaintiff's true limitations in the questions he posed to the vocational expert.

Mental Impairments

Claimant's first challenge to the ALJ's review of the record involves two further allegations of error: failure to order a psychiatric examination of the claimant, and failure to link Psychiatric

Review Technique ("PRT") findings to the evidence in the case. (Docket #11, at 3-4.) The record shows, however, that there is substantial evidence to support the ALJ's findings without resort to additional psychological testing.

Claimant testified at the November 18, 1995 hearing that his mental illness has kept him from working (R. 34), and he characterizes his mental illness as depression and schizophrenia. (R. 35.) He said that he had been suffering from mental illness from the time he was 17 years old, but it was not a problem until about six years prior to the hearing. (R. 39.) He maintained that he was depressed two or three times a month, but sometimes a month or two would pass when he was not depressed. His depression could last an hour or a week. He had not tried to find a job within the previous year because he was going to Parkside Community Psychiatric Services & Hospital ("Parkside") four days a week for treatment. (R. 36-37, 39.) The rest of the time he stayed at home in his apartment where he watched TV, cleaned and cooked. He did not read, do laundry or visit with people. (R. 40.) He had problems sleeping, but if he took his medication he could sleep. He testified that he had heard groans that nobody else hears. Although he had suicidal thoughts he had never tried to kill himself. (R. 37-38.)

When asked by his attorney, claimant stated that he had previously told her that he was suffering from anxiety and paranoia. (R. 43.) He said that his paranoia consisted of thinking that everyone was out to get him. It lasted about thirty minutes and occurred a couple of times a month. He worried all the time and it caused him to throw up. (R. 44.) As a child, he was placed in special education classes and diagnosed with attention deficit disorder. He testified that his concentration was not good now, and he was easily distracted. (R. 45.) At the time of the hearing, he had applied to Westview, but had not received any treatment. (R. 48.) He had no hobbies or social activities.

He took Xanax (anti-depressant), but his prescriptions made him tired (R. 53), and one of his prescriptions blurred his vision. He believed that he was unable to work because of his paranoia, among other things. (R. 54.)

Claimant's Disability Report, dated September 26, 1994, indicates that claimant's condition is "arm & legs & depression," and it first bothered him in 1983. The longest he had worked was 6 months but he has "worked here & there short term." (R. 104.) He had no doctor, treatment or medicines. (R. 105-106.) He lived on the street, wandered around, did not talk to anyone and could not drive. (R. 107.) He said that he completed the 10th grade in 1983. He has worked for very brief periods for the Salvation Army (ringing a bell), sweeping at the fairgrounds, in the kitchen at a mission, making barrels, skinning chickens in a chicken plant, and making sandwiches in a canteen. (R. 108.) He slept ten hours a night, and had trouble waking up. (R. 112.)

The record shows that claimant missed two mental examinations scheduled by the Commissioner (R. 68.) The Commissioner initially denied his application because claimant did not keep his appointments and thus, the Commissioner did not have enough information to show that claimant was disabled. (R. 70.) On reconsideration, medical consultant Janice C. Boon, Ph.D., noted on January 26, 1995, that claimant was borderline intellectual functioning. (R. 76.) She stated that he was "[s]omewhat impulsive, claims easy irritability, mild depression, refused meds." (R. 78.) She noted no evidence of schizophrenic, paranoid or other psychotic disorders in diagnostic category 12.03 (R. 79), in category 12.04 (affective disorders) (R. 80.), in 12.05 (anxiety related disorders) or in 12.08 (personality disorders). In her view, claimant's functional limitations, as a result of his borderline intellectual functioning, were "moderate" for restriction of activities of daily living, "slight" for difficulties in maintaining social functioning, "often" for deficiencies of concentration,

persistence or pace resulting in failure to complete tasks in a timely manner (in work settings or elsewhere) and "never" for episodes of deterioration or decompensation in work or work-like settings. (R. 84.) Her assessment of claimant's functional capacity is as follows: "this 29 year old male can understand[,] remember and carry out non complex and some moderately detailed work instructions in low stress environments. He can relate to co-workers, supervisors and general public in at least a superficial manner. He can be expected to adapt to workplace changes." (R. 87.)

The Commissioner also relied upon the report of John Hickman, Ph.D., in its determination to deny benefits on reconsideration. (R. 95.) Dr. Hickman saw claimant on January 11, 1995. Claimant said that he "thinks at times he hears a dog barking and nobody is around." (R. 137.) Dr. Hickman gave him the Wechsler Adult Intelligence Scale - Revised, and claimant obtained a full-scale IQ of 76. Dr. Hickman reported: "Mr. Childress is functioning in the borderline range of mental ability. He has a limited educational background. He can do simple addition and subtraction, although he tends to be a little impulsive and sometimes makes mistakes, but I think he is capable of managing his own funds." (R. 138.)

The notes from Parkside are dated December 1994, and from March 1995 through July 1995. The psychiatric evaluation taken by Valetta Birdcreek on December 20, 1994, indicates the following:

> Mental Status Examination: the client is a 29-year-old, single, white male standing 5'9" tall and weighing 300 pounds. He has shoulder length, brown hair. He does not wear glasses and he is ambulatory. He is alert and coherent. He has a sad affect, good eye contact, a moderate tone of voice, good posture, and good personal hygiene. He denies hallucinations and delusions. His mood is depressed. He is able to remember four of the past four recent presidents. His immediate memory is intact. He is able to recall three out of three objects in three minutes. His memory is fair. He is able to remember the names of childhood friends and pets, and holidays and special activities as a child. His concentration is good based on his performance of serial sevens and his attention span. He is judged to be of average

intelligence as shown by his vocabulary and thought content used during this interview. His judgment and insight are good.

(R. 156.) On December 21, 1994, the staff at Parkside diagnosed claimant with "depressive disorder NOS, and obesity." Patti A. Brooks noted as claimant's assets: "Strong motivation for treatment; Physically mobile; Stable physical health; Effective decision making skills; Appropriate personal hygiene; Stable housing; Average or above intellect." She set forth his liabilities as: "Unable to maintain daily living skills; Lacks effect; cping/strss mangmnt [sic] skills; Lacks insight into illness; Insufficient income for basic needs; Lack of transportation; Lacks constructive recreational activity; Unemployed." (R. 156.)

The Parkside notes from Spring 1995 show that claimant attended a variety of activities while he was in the supervised housing program. He kept his apartment clean, and he had learned to make his food stamps last all month. He reported some trouble sleeping. While at Parkside, he took desipramine and Pamelor. (R. 153.) The medical resident there, Bryan K. Touchet, reported that the claimant had "goal-directed thoughts without any evidence of psychosis." (R. 147.) As part of his treatment plan, claimant was to "report any changes in the symptoms of the mental illness with which he has been afflicted," and a "staff nurse will teach a weekly medication education class in order to answer questions/concerns about psychotropic medications and other issues related to mental illness." (R. 150.)

The ALJ's decision indicates that he reviewed the entire record. He emphasized claimant's IQ and his evaluations at Parkside. "The claimant's mental status showed him to be of normal intelligence, he could spell "world" backwards and forwards, his memory was intact, his concentration was good, and judgment and insight were good. His diagnosis was depressive disorder

NOS, obesity with a global assessment of functioning of 75 (transient and expected reactions to psychosocial stresses). The claimant attended almost daily sessions during June and July 1995 without any significant problems." (R. 15.) The ALJ assessed the severity of claimant's depression as "less than severe," and the ALJ noted the absence of any limitations upon claimant's daily activities due to claimant's depression. (R. 17.) The ALJ also completed a PRT form, indicating that claimant suffered from an depressive disorder, NOS, but that claimant suffered from no functional limitations at the 12.04 (Affective Disorders) listing level. (R. 20-22.)

Since the record contained evidence of a mental impairment that allegedly prevented the claimant from working, the ALJ was required to follow the procedure for evaluating the potential mental impairment set forth in 20 C.F.R. § 416.920a and to document the procedure accordingly. Hill v. Sullivan, 924 F.2d 972 (10th Cir. 1991). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ then prepares the PRT form. Cruse v. United States Dept. of Health and Human Services, 49 F.3d 614 (10th Cir. 1995). "There must be competent evidence in the record to support the conclusions recorded on the PRT form and the ALJ must discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form." Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994) (quotations and alterations omitted). This the ALJ did.

The ALJ was not required to order a psychiatric examination, especially since he had the records from Parkside and from Dr. Hickman before him. Under the regulations a consultative examination is unnecessary unless the ALJ needs information that is not readily available from the records of his medical treatment source or he is unable to seek clarification from claimant's medical

source. 20 C.F.R. § 416.912(f). Further, claimant's situation is not one in which the evidence as a whole is insufficient to support a decision. 20 C.F.R. § 416.919a. An ALJ has broad latitude in ordering consultative examinations. See Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 778 (10th Cir. 1990). The ALJ did not err in failing to order a psychiatric examination of the claimant or to link his PRT findings to the evidence in the case.

Pain and Limited Mobility

Claimant's second allegation of error is that the ALJ failed to properly consider claimant's pain and limited mobility. In the September 1994 Disability Report, claimant stated that he could not lift with his left arm because it had been broken and it has metal in it. His knees were painful, and he could not climb stairs. (R. 104.) However, he had no doctor, treatment or medicines. (R. 105-106.) When he worked, he frequently lifted or carried over 50 pounds, and he lifted and carried pots. (R. 109.) He weighed 300 pounds. (R. 111.) In October of 1994, Dr. Robert C. Harris examined claimant and made the following assessment: "1) Post traumatic arthritis of the left elbow and shoulder. 2) Sprain of the left ankle causing probably tendinitis in that there is tenderness on palpation of the lateral aspect of the left ankle." (R. 133.)

The record shows that claimant had surgery on his left elbow in August 1991 (R. 126-27), and the Commissioner considered the reports of the surgeon in the initial denial of disability in November 1994. (R. 70). On reconsideration, claimant's condition was unchanged as of December 16, 1994. (R. 118.). In January 1995, the medical consultant assessed his exertional limitations as follows: claimant could occasionally lift and/or carry 50 pounds; he could frequently lift and/or carry 25 pounds; he could stand, walk or sit for about 6 hours in an 8-hour workday; and his ability

to push and/or pull was unlimited, other than his limitations to lift and/or carry. The consultant specifically noted that "pain is not an additional factor." (R. 89.)

At the hearing on November 28, 1995, the ALJ asked sufficiently probing questions on the incidence of pain and on claimant's activities to meet the ALJ's obligation to develop the record. See Jordan v. Heckler, 835 F.2d 1314 (10th Cir. 1987). Claimant stated his physical impairments in this manner: (1) he broke his arm and has problems lifting with it; (2) he tore the ligaments in his ankle, or twisted it, and he gets a sharp pain in it when he walks; and (3) he cannot walk far because of pain in his lower back. However, he has never seen a doctor about it. (R. 41.) He went to a hospital emergency room when he hurt his ankle in 1993, but he has not had any treatment on it since then. Claimant said that the heaviest thing he could lift was 20 pounds with both hands. (R. 42.) He can lift a gallon of milk with either hand. He can stand for an hour before he has to sit, and he can walk less than a quarter of a mile before he has to sit. He has no problems sitting. (R. 43.)

Upon prompting by his attorney, he said that his legs go numb after he walks about half a mile. Claimant sometimes has pain between his shoulder blades, and his back pain is his worst physical problem. (R. 46.) Upon further prompting, he stated that he gets short of breath when he walks, and he cannot do any bending. Yet, he did a lot of bending in his cafeteria job, and he lifted 40 pounds or more in that job. (R. 47.) Claimant believes that he is unable to work because he could not stand on his feet for six hours a day. (R. 54.) Nor could he sit for 1 ½ - 2 hours, or put small parts together because of his nerves. (R. 55.)

The ALJ may discount the significance of subjective complaints because of a lack of corroborative objective evidence. See Talley v. Sullivan, 908 F.2d 585 (10th Cir. 1990). In so doing, the ALJ may consider claimant daily activities. See Hamilton v. Secretary of Health &

Human Services, 961 F.2d 1495, 1499 (10th Cir. 1992). Claimant's subjective complaints of pain and limited mobility were not objectively corroborated, and they were inconsistent with claimant's own recounting of his activities and abilities throughout the relevant period.

The ALJ evaluated claimant's allegations of pain and limited mobility, pointing out the specific inconsistencies between the claimant's statements and his actions. "Though he alleges back pain for the last year, he has not told anyone about it. He says he has a sharp pain in his left ankle when he walks, but his only treatment was when he went to the emergency room some 2 years ago." (R. 15.) The ALJ questioned inquired of claimant's daily activities as well, and found them to be inconsistent with his complaints. The ALJ also pointed to the medical records indicating purely subjective findings of pain in claimant's elbow and ankle. (R. 15-16.) "[T]he primary reasons that I find claimant's allegations to not be fully credible are, but are not limited to, the objective findings, or the lack thereof, by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians and the lack of discomfort shown by claimant at the hearing." (R. 16.) The ALJ properly considered claimant's complaints of pain and limited mobility.

Credibility Analysis

Thus, claimant's contention that the ALJ's credibility analysis does not comply with the requirements of Kepler v. Chater, 68 F.3d 387 (10th Cir. 1987), is also without merit. The ALJ gave reasons as well as conclusions, and he pointed to specific medical evidence, or the lack thereof, relevant to numerous factors in support his findings. There is no missing link between the evidence

and each factor[4] that led him to conclude that claimant's subjective complaints were not credible. The ALJ did not fail to evaluate correctly the claimant's mental impairment in combination with the effects of his pain, as required by Luna v. Bowen, 834 F.2d 161, 163 (10th Cir. 1987), even though the ALJ's opinion might have been "better and more thorough." See Daniels v. Apfel, 154 F.3d 1129, 1136 (10th Cir. 1998).

RFC Assessment

Nor did the ALJ fail to perform a proper RFC assessment. The ALJ found that claimant was impaired by some pain which was severe enough to reduce claimant's ability to work.[5] (R.18.) He also found that claimant's impairment did not meet or equal the criteria of any impairment listed in Appendix 1 of Subpart P, Part 404, 20 C.F.R.; that claimant has the residual functional capacity to perform a full range of light work of an unskilled nature subject to only simple, repetitive work because of borderline IQ; and that claimant had no past relevant work and, in fact, has not engaged in any substantial gainful activity since January 1, 1991. (R. 18.) Light work is defined as involving lifting of no more than twenty pounds, with frequent lifting of objects weighing up to ten pounds, and it requires a good deal of walking or standing, or it may involve sitting most of the time with

---

4 The Tenth Circuit has considered numerous factors in addition to test results when determining the credibility of subjective complaints of pain: "the levels of medication and their effectiveness, the extensiveness of attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence." Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991) (quoting Huston v. Bowen, 838 F.2d 1125, 1132 (19th Cir. 1988); accord Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987) (citations omitted).

5 The ALJ incorrectly designated the pain as "shoulder" pain. Since there was no mention of shoulder pain elsewhere in his decision, in the hearing transcript or anywhere in the record, the Court assumes that the ALJ intended to reference claimant's alleged "arm" pain.

some pushing and pulling of arm or leg controls. 20 C.F.R. § 416.967(b). Unskilled work is defined as work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. 20 C.F.R. §, 416.968(a). The ALJ's RFC assessment, as discussed above, was not improper.

Vocational Expert

The ALJ relied upon the testimony of a qualified vocational expert to determine that the Commissioner met his burden of proof at the fifth step of the disability evaluation process. (R. 18.) The vocational expert established that work exists in significant numbers in the national economy which the claimant can perform, given his age, education, work experience, and RFC. The Vocational Expert, Dr. William D. Young, testified that jobs exists for a person with the residual functional capacity to perform light work, subject to only simple, repetitive work because of a borderline IQ. Due to the limitation, Dr. Young made a 50 percent reduction in his estimation of the number of such jobs available in Oklahoma. These jobs include assembly, kitchen help, janitorial and inspector jobs. (R. 56-57.)

Claimant alleges as error the ALJ's failure to include the Plaintiff's true limitations in the questions he posed the vocation expert, since the ALJ's questions asked the vocational expert to assume that the claimant could perform light work. (Docket #11, at 5.) The Tenth Circuit has addressed this issue numerous times in a variety of ways, and it has consistently held that such hypothetical questions are not improper where there is substantial evidence to support the assumption upon which the vocational expert was asked to base his opinion. See, e.g., Jordan v. Heckler, 835 F.2d 1314, 1316 (10th Cir. 1987) (ALJ's failure to include pain factor in hypotheticals was not inappropriate because sufficient evidence was lacking that plaintiff's pain prohibited him

from performing light or sedentary work); Brown v. Bowen, 801 F.2d 361, 363 (10th Cir. 1986) (ALJ's decision was not undermined by the fact that the ALJ may have asked hypothetical questions of the vocational expert which did not fully itemize all the disabilities claimed by the worker). The ALJ's questions to the vocational expert were not improper.

VI. CONCLUSION

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this 23rd day of November, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BARBARA S. TAFF,
SSN: 440-40-0636

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-956-J

JUDGMENT

This action has come before the Court for consideration, and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 20th day of November 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(14)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BARBARA S. TAFF,
SSN: 440-40-0636

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-956-J

ORDER[2/]

Plaintiff, Barbara S. Taff, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because (1) the ALJ failed to properly evaluate Plaintiff's neurological impairment, and (2) the ALJ failed to consider Plaintiff's neurological impairment in concluding that Plaintiff could perform the demands of her past relevant work. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

1/ On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

2/ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

3/ Administrative Law Judge James D. Jordan (hereafter "ALJ") concluded that Plaintiff was not disabled on February 7, 1997. [R. at 12]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on August 26, 1997. [R. at 4].

(13)

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on August 26, 1941, and was 55 years old at the time of her hearing before the ALJ. [R. at 289]. Plaintiff has had one lung removed due to a malignancy, and has had triple bypass surgery. Plaintiff testified that medication "solved" her lung problem. [R. at 304]. Plaintiff testified that she had problems with her hip and that it sometimes "popped out" and caused her to fall. [R. at 307]. Plaintiff additionally testified that she suffered from thoracic outlet syndrome which led to decreased grip strength in her right hand and caused her to frequently break dishes. [R. at 310]. According to Plaintiff, her doctor recommended therapy for the thoracic outlet syndrome, but Plaintiff could not afford it.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.[4/] See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

---

[4/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[5/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. REVIEW

APPLICATION OF JAMES V. CHATER

Plaintiff appealed the decision of the ALJ to the Appeals Council. Plaintiff asserted as errors to the Appeals Council: (1) that the ALJ erred by failing to comply with Social Security Regulation 82-61 and the Tenth Circuit Court of Appeals decision

---

5/ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

in Henrie at Step Four, and (2) that the ALJ improperly concluded based on the claimant's daily activities that she was not fully credible.

Plaintiff filed Plaintiff's Memorandum Brief in this Court on April 22, 1998. Plaintiff asserts, as errors on appeal, that the ALJ failed to properly consider Plaintiff's neurological impairment in assessing Plaintiff's residual functional capacity ("RFC"), and that Plaintiff did not properly consider Plaintiff's neurological impairment in determining whether Plaintiff could perform the demands of her past relevant work ("PRW").

Defendant asserts that Plaintiff did not raise, in her brief to the Appeals Council, the issues that Plaintiff now asserts on appeal. Plaintiff refers to James v. Chater, 96 F.3d 1341, 1344 (10th Cir. 1996). Defendant asserts that because Plaintiff failed to raise these issues to the Appeals Council, Plaintiff waived the issues and cannot, at this time, assert the issues in District Court.

Plaintiff is permitted to file a reply brief in accordance with the scheduling order. [Doc. No. 5-1]. Plaintiff did not file a reply brief and Plaintiff has presented no response in this Court to the waiver argument asserted by Defendant.[6/] Plaintiff did, in Plaintiff's brief to the Appeals Council, acknowledge that Plaintiff had received notice of the James decision from the Commission.

[6/] In Plaintiff's brief to the Appeals Council Plaintiff notes that Plaintiff did not have a copy of the transcript of the hearing when Plaintiff prepared her Appeals Council brief. Plaintiff does not assert this argument before the District Court. Regardless, the development by Plaintiff of Plaintiff's asserted issues of errors before the Appeals Council and the District Court are not dependent upon Plaintiff's having received a copy of the transcript prior to the appeal to the Appeals Council.

In James, the Tenth Circuit Court of Appeals noted that "[o]rdinarily issues omitted from an administrative appeal are deemed waived for purposes of subsequent judicial review." James, 96 F.3d at 1343. The Tenth Circuit concluded that this general rule should also be applied to social security disability adjudications. In James, the claimant did not file a brief at the Appeals Council level but asserted that he was disabled and entitled to benefits. The Court concluded that "[s]uch a statement was plainly inadequate to apprise the Appeals Council of the particularized points of error counsel has subsequently argued in the courts." Id.

In this case, the Plaintiff argued before the Appeals Council that the ALJ failed to make the appropriate three-step findings at Step Four, and that the ALJ improperly concluded Plaintiff could work based on Plaintiff's daily activities. Plaintiff does not assert these issues in Plaintiff's appeal to this Court. Before this Court, Plaintiff asserts that the ALJ did not properly evaluate her neurological impairment, and did not include a neurological impairment in his assessment of whether or not Plaintiff could return to her past relevant work. The issues presented to the Appeals Council are obviously different than the issues Plaintiff raises to the District Court on appeal. The Court concludes that the issues which Plaintiff asserted to the Appeals Council are insufficient to have apprised the Appeals Council of the issues which Plaintiff raises in his current appeal to this Court. Plaintiff has therefore waived the assertion of the issues which Plaintiff has raised in this Court due to Plaintiff's failure to assert those issues to the Appeals Council. Further, as noted above, Plaintiff does not discuss James, and does not address Defendant's argument that Plaintiff has waived the

issues on appeal pursuant to James. The Court concludes that Plaintiff has waived the assertion of the issues currently asserted on appeal pursuant to James, and the decision of the Commissioner is affirmed on this basis.

Accordingly, the Commissioner's decision is **AFFIRMED.**

Dated this 20 day of November 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

AMBER WOLKEN, a minor, by and through her parent and next friend SHELLY CURTIS, and SHELLY CURTIS, individually,

Plaintiffs,

v.

BRIAN M. BRIDGES

Defendant.

Case No. 98-CV-414-H

ORDER

This matter comes before the Court on a motion to dismiss by Defendant Brian M. Bridges (Docket # 3), and a motion to transfer by Plaintiffs Amber Wolken, a minor, by and through her parent and next friend, Shelly Curtis, and Shelly Curtis, individually (Docket # 5).

Plaintiffs have brought this action alleging that Defendant acted carelessly, recklessly, and/or negligently in causing an automobile accident with Plaintiff Wolken.

I

This action involves an automobile accident that occurred in Erie, Kansas, between Plaintiff Wolken, a resident of Tulsa County, Oklahoma, and Defendant Bridges, a resident of Neosho County, Kansas.

Plaintiffs' complaint alleges that on December 2, 1996, while Defendant Bridges was driving his vehicle in the area of Main and 3rd Street, Erie, Kansas, he struck Plaintiff Wolken who was a pedestrian running beside Defendant's vehicle at the time. Plaintiffs' complaint further alleges that in striking Plaintiff Wolken, Defendant was careless, reckless, and/or negligent in one or more of the ways as follows:

> a. by failing to operate his vehicle as a careful and prudent operator of a motor vehicle in that he failed to use the means at hand such as the steering and braking mechanisms of his vehicle in such a manner as to avoid causing the above accident;

b. by failing to exercise that degree of care which a reasonably prudent person would have exercised under the same or similar conditions, taking into account the visibility, the condition of the roadway, the location of the Plaintiff and other relevant factors;
c. by reckless driving;
d. by failing to maintain a proper lookout; [and]
e. by failing to stop as Plaintiff was running beside Defendant's vehicle[.]

Pls.' Compl. ¶ 6. In filing their complaint, Plaintiffs allege that the Northern District of Oklahoma has jurisdiction over this action based on diversity of citizenship pursuant to 28 U.S.C. § 1332.

II

Defendant contends that there is improper venue in Oklahoma since he resides in Kansas and since the alleged accident occurred in Kansas. The statute governing venue provides as follows:

> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise by brought.

28 U.S.C. § 1391(a). In objecting to Defendant's motion, Plaintiffs contend that Defendant's motion should be overruled, or in the alternative, that the Court should transfer this action to the United States District Court of Kansas in Wichita, Kansas pursuant to 28 U.S.C. 1404(a). In support of their suggested alternative disposition of this action, Plaintiffs filed a motion to transfer in response to Defendant's motion to dismiss.

Federal law allows a transfer of venue "[f]or the convenience of the parties and witnesses [and] in the interest of justice . . . ." 28 U.S.C. § 1404(a). Section 1404(a) provides the Court with discretion to transfer any civil action to any other district where it might have been brought for the convenience of the parties and witnesses and in the interest of justice. The parties requesting transfer pursuant to Section 1404(a) bear the burden of establishing that the existing

forum is inconvenient and that transfer is in the interest of justice. Additionally, "both the transferor and the transferee court [must] have venue over the action . . ." Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515 n.3 (10th Cir. 1991), and personal jurisdiction over the defendants in order to transfer such action. See Chrysler Credit Corp, 928 F.2d at 1515; see also Rhea v. Muskogee General Hospital, 454 F. Supp. 40, 43 (E.D. Okla. 1978).

Based upon a review of the record, the Court finds that venue is improper in the Northern District of Oklahoma. Facts that support this finding include Defendant being a resident of Kansas, Defendant's alleged negligence giving rise to Plaintiffs' claim occurring in Kansas, and Defendant not being subject to personal jurisdiction at the time Plaintiffs commenced with this action. Applying these facts to the prescriptions of § 1391(a) thus compels a finding that venue is improper in Oklahoma. Further, while the personal jurisdiction requirement may be satisfied for purposes of transferring this lawsuit pursuant to § 1404(a),[1] the want of venue over this action renders the Court without the requisite authority to transfer. See Chrysler Credit Corp., 928 F.2d at 1515 n.3 (10th Cir. 1991).

For the foregoing reasons, the Court grants Defendant's motion to dismiss on grounds of improper venue (Docket # 3) and denies Plaintiffs' motion to transfer this matter to the District of Kansas (Docket # 5).

IT IS SO ORDERED.

This 18TH day of November, 1998.

Sven Erik Holmes
United States District Judge

[1] The record provides no evidence that the Court maintains personal jurisdiction over Defendant. However, Defendant did not contest personal jurisdiction in answering Plaintiffs' complaint thus effectively waiving lack of personal jurisdiction as a basis for dismissal. See Fed. R. Civ. P. 12(h).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SANDY EDMISTON, Plaintiff, v. SEARS ROEBUCK, INC., a New York Corporation; STEVEN L. BRUCE; J MICHAEL MORGAN; PARTNERSHIP OF BRUCE AND MORGAN, Attorneys at Law, Defendants.	)	97-CV-731-H

ORDER

This matter comes before the Court on Defendant J Michael Morgan ("Mr. Morgan"), Defendant Steven L. Bruce ("Mr. Bruce"), and Defendant Sears Roebuck Inc.'s ("Sears'") Motion for Summary Judgment (Docket # 19) and Plaintiff Sandy Edmiston's Cross-Motion for Partial Summary Judgment (Docket # 25). Plaintiff alleges violations of the Fair Debt Collection Practices Act ("FDCPA") and various state law claims. In the first page of her brief, Plaintiff concedes that summary judgment is properly entered in favor of Sears and Mr. Bruce as to the FDCPA claims, and the Court accordingly grants summary judgment in favor of Mr. Bruce and Sears on all FDCPA claims. Having considered the arguments and the record as presented in those motions, for the reasons expressed herein the Court concludes that Defendants' Motion for Summary Judgment should be granted in part and denied in part, and that Plaintiff's Cross-Motion for Partial Summary Judgment should be denied.

I

Summary judgment is appropriate where "there is no genuine issue as to any material

fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly

probative, summary judgment may be granted.") (citations omitted).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

II

Based upon a review of the record, the Court finds that Plaintiff has set forth no evidence upon which a reasonable jury could find that any of the Defendants used abusive language in the collection of a debt in violation of 15 U.S.C. § 1692(d)(2). Accordingly, summary judgment on Plaintiff's abusive language claim under the FDCPA is properly entered in favor of all Defendants.

With respect to Plaintiff's claims against Mr. Morgan and the Partnership of Bruce and Morgan ("the Partnership") under the collection and communication provisions of the FDCPA, see 15 U.S.C. §§ 1692(c)(a)(2) & (f)(1), based upon a review of the record, the Court finds that genuine issues of material fact exist as to whether each of those Defendants attempted to collect a debt not authorized by the SearsCharge Agreement creating the debt and whether each of those Defendants communicated with the Plaintiff ex parte concerning the collection action while she was represented by an attorney. Accordingly, as to Mr. Morgan and the Partnership, Defendants' Motion for Summary Judgment and Plaintiff's Cross-Motion for Partial Summary Judgment on those FDCPA claims are hereby denied.

Plaintiff and Defendant also seek summary judgment on the state law claims against

Defendants for intentional infliction of emotional distress, invasion of privacy, malicious prosecution, and bad faith. The Court initially notes that Plaintiff failed to respond to Defendants' arguments for dismissal of her bad faith and invasion of privacy claims. Based upon an independent review of the record, the Court finds that Plaintiff has presented no evidence from which a reasonable jury could conclude that any intrusion of the Plaintiff's privacy by any of the Defendants would be highly offensive to a reasonable person. See Munley v. ISC Financial House, Inc., 584 P.2d 1336, 1338-39 (Okla. 1978). Further, Plaintiff has adduced no evidence of a special relationship between Plaintiff and any of the Defendants which would support a claim of bad faith. See In Re Colclazier, 134 B.R. 29, 33-34 (Bankr. W. D. Ok. 1991) (citing Oklahoma cases). Accordingly, all Defendants are entitled to summary judgment in their favor on Plaintiff's invasion of privacy and bad faith claims.

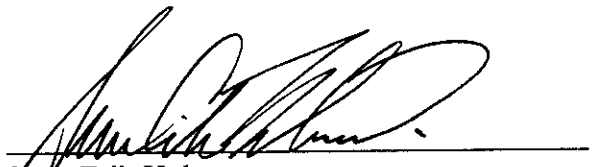
Moreover, with respect to Plaintiff's malicious prosecution and intentional infliction of emotional distress claims, Plaintiff has failed to adduce evidence that any of the Defendants brought the underlying state proceedings with malice, see Greenberg v. Wolfberg, 890 P.2d 895, 903 (Okla. 1994), or that any of the Defendants' conduct would reasonably be regarded as extreme or outrageous by a reasonable jury. See generally Breeden v. League Servs. Corp., 575 P.2d 1374 (Okla. 1978). Thus, summary judgment is properly entered in favor of all Defendants as to Plaintiff's intentional infliction of emotional distress and malicious prosecution claims.

Based on the above, Defendants' Motion for Summary Judgment (Docket # 19) is hereby granted in favor of all Defendants as to all Plaintiff's state law claims and as to Plaintiff's abusive language claim under 15 U.S.C. § 1692(d)(2). Further, Defendants' Motion for Summary Judgment is hereby granted in favor of Sears and Mr. Bruce and denied as to Mr.

Morgan and the Partnership with respect to Plaintiff's remaining claims under the FDCPA. Plaintiff's Cross-Motion for Partial Summary Judgment (Docket # 25) is hereby denied in its entirety.

IT IS SO ORDERED.

This 20TH day of November, 1998.



Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FRANCOISE WASS BOWE,

Plaintiff,

vs.

HUGHES LUMBER COMPANY, a Limited Partnership,

Defendant.

No. 98 CV 0285K(E)

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to FED.R.CIV.P. 41, and the settlement agreement reached on November 4, 1998, the parties, and each of them, by and through their respective counsel of record, herewith stipulate and agree to the dismissal with prejudice of said cause, including all complaints, counterclaims, cross complaints and causes of action of any type by any party against any or all of the other parties. Each party shall bear her, its, or their own costs, expenses, and attorney fees without assessment against any other party.

Executed the respective dates shown adjacent to each signature.

Date: 11/20/98

Mark Bransford
Attorney for Plaintiff, Francoise Wass Bowe

Date: 11-23-98

Jo Anne Deaton
Attorney for Defendant, Hughes Lumber Company

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of November, 1998, a true and correct copy of the foregoing instrument was mailed by first class mail with proper postage prepaid, to Mark H. Bransford, 406 S. Boulder, Suite 408, Tulsa, OK 74103.

Jo Anne Deaton

JAD/bjo
1224-10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 97-CV-306-K**
	)	
THREE KNOWN PARCELS OF REAL PROPERTY KNOWN RESPECTIVELY AS:	)	
6913 East Newton Place,	)	
6914 East Newton Place,	)	
6920 East Latimer Place,	)	
WITH ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON;	)	
	)	
All in the City of Tulsa, Tulsa County, State of Oklahoma,	)	
	)	
Defendants.	)	

ORDER

This matter comes before the Court on a Motion for Partial Summary Judgment (#32) filed by the Plaintiff, United States of America, pursuant to Rule 56 of the Federal Rules of Civil Procedure. The United States moves for summary judgment on the issue of probable cause to forfeit properties which were allegedly used to facilitate drug trafficking, or purchased with proceeds therefrom.

Underlying this action are the convictions of Romualdo Cordoba and his wife, Teresa Cordoba, both of whom plead guilty to the criminal charges pending against them. As a result of those convictions, the United States brought this forfeiture action for possession of the properties at issue, alleging they were purchased with funds derived from drug trafficking, or were used in the

35

furtherance of the drug trade in violation of the laws of the United States.[1]

21 U.S.C. §881(a)(6) & (7) deprives narcotics traffickers of their illegally obtained wealth. Specifically, that statute provides, in relevant part, for the forfeiture of:

> All money, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.
>
> All real property, including any right, title and interest (including any leasehold interest) in the whole of any lot of tract of land and any appurtenance or improvement, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of any interest of any owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

The plaintiff has the burden of proof to establish a preliminary showing that probable cause exists for the forfeiture of the property. *United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106 (9th Cir. 1976) per curiam. *See* 19 U.S.C. §1615 (extending the probable cause standard to actions pursuant to 21 U.S.C. §1881). Once the United States has established probable cause, the burden shifts to the Claimants--in this case, Teresa Cordoba, Maria Arroyo and Jose Luis Arroyo--to prove a defense of innocent ownership by a preponderance of the evidence.[2]

The standard for summary judgment requires that the Court draw inferences favorable to the

---

[1]The three properties at issue were 6913 East Newton Place, 6914 East Newton Place, and 6920 East Latimer Place. 6913 East Newton Place was dismissed from this forfeiture action pursuant to a stipulation filed by the United States August 26, 1997. Only the other two properties remain at issue.

[2]Romualdo Cordoba is not a party in interest. In his plea agreement was the condition that he would forfeit any property or proceeds used in or to facilitate drug trafficking.

nonmoving party. However, the Claimants have altogether failed to respond to the United State's motion. According to Local Rule 7.1(c), a motion for which there is no response is deemed confessed. This Court has conducted an independent inquiry, however, notwithstanding the local rule, and concludes that there is no genuine issue of material fact for trial as to the forfeiture of the properties. The United States has provided this Court with a substantial record indicating that the properties were, indeed, used for drug trafficking or purchased with the proceeds therefrom. The Claimants have offered nothing in support of their contention that the ownership was innocent, and, in fact, have altogether failed to respond to the motion.

The Plaintiff's Motion for Partial Summary Judgment (#32) is hereby GRANTED.

ORDERED this 19th **day of November, 1998.**

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 97-CV-306-K**
	)	
THREE KNOWN PARCELS OF REAL PROPERTY KNOWN RESPECTIVELY AS:	)	
6913 East Newton Place,	)	
6914 East Newton Place,	)	
6920 East Latimer Place,	)	
WITH ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON;	)	
	)	
All in the City of Tulsa, Tulsa County, State of Oklahoma,	)	
	)	
Defendants.	)	

FILED
STC
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE 11/23/98

JUDGMENT

This action came on for consideration before the Court. The issues having been duly heard and a decision having been duly rendered.

IT IS THEREFORE ORDERED that the Plaintiff, United States of America, may seize the properties at issue, 6914 East Newton Place, and 6920 East Latimer Place pursuant to 21 U.S.C. §§881(a)(6) & (7).

ORDERED this 20th day of NOVEMBER, 1998

Terry C. Kern

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

30

ENTERED ON DOCKET

DATE 11-23-98

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN OF OKLAHOMA

FILED

NOV 20 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

COMMUNICATION GRAPHICS, INC., an Oklahoma corporation, Plaintiff, vs. CON-WAY TRANSPORTATION SERVICES, INC., a Delaware corporation, d/b/a CONWAY SOUTHERN EXPRESS, Defendant.	Case No. 98-CV-0226K(J) Tulsa County District Court Case No. CJ 98-0703

JOINT STIPULATION OF DISMISSAL

Plaintiff and Defendant, pursuant to Rule 41(a), file this Joint Stipulation of Dismissal with prejudice on the grounds that the claims of the parties have been compromised and settled.

MICHAEL JAMES KING, OBA #5036
WINTERS, KING & ASSOCIATES, INC.
2448 East 81st Street, Suite 5900
Tulsa, OK 74137-4259
(918) 494-6868
ATTORNEY FOR PLAINTIFF
COMMUNICATION GRAPHICS, INC.

And

DAVID B. SCHNEIDER, OBA #7969
RICHARD C. LABARTHE, OBA #11393
SCHNEIDER & LABARTHE, P.A.
210 Park Avenue, Suite 1975
Oklahoma City, OK 73102
(405) 232-9990
(405) 232-9992 (FAX)
ATTORNEYS FOR DEFENDANT
CON-WAY TRANSPORTATION SERVICES, INC.
D/B/A CONWAY SOUTHERN EXPRESS